

2005

Antone R. Thompson v. Department of Commerce, Division of Occupational and professional licensing : Brief of Respondent

Utah Court of Appeals

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Antone Rodney Thompson; pro se.

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IN THE UTAH COURT OF APPEALS

ANTONE R. THOMPSON,	:	
Petitioner,	:	
v.	:	Case No. 20050894-CA
STATE OF UTAH, DEPARTMENT OF	:	
COMMERCE, DIVISION OF	:	
OCCUPATIONAL AND PROFESSIONAL	:	
LICENSING,	:	
Respondent.	:	

BRIEF OF RESPONDENT STATE OF UTAH

PETITION FOR REVIEW OF FINAL AGENCY ACTION
BY THE DEPARTMENT OF COMMERCE, DENYING
PETITIONER'S REQUEST TO RESCIND A STIPULATION

Antone Rodney Thompson
350 S. 500 W.
Cedar City, Utah 84720
Petitioner

ANNINA M. MITCHELL #2274
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Salt Lake City, UT 84114-0858

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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OCCUPATIONAL AND PROFESSIONAL	:	
LICENSING,	:	
Respondent/Appellee.	:	

BRIEF OF RESPONDENT

STATEMENT OF JURISDICTION

This action comes within the original jurisdiction of this Court under Utah Code Ann. § 78-2a-3(2)(a) (West 2004) (appeals from agency formal adjudicative proceedings).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

ISSUE 1. Did Petitioner waive his right to appellate review regarding his allegation that he was not able to obtain transcripts from the 1999 hearing?

ISSUE 2. Did Petitioner waive his right to appellate review regarding what Petitioner calls the “two-day rule”?

ISSUE 3. Did Petitioner waive his right to appellate review regarding his claim that the Department of Occupational and Professional Licensing violated Article I section 10 of the Constitution?

STANDARD OF REVIEW FOR ISSUES 1-3 RAISED ON APPEAL

In appealing an agency decision, a petitioner has “the obligation to raise all the issues that could have been presented at that time, and those issues not raised [are] waived.”

Ashcroft v. Industrial Comm’n of Utah, 855 P.2d 267, 268 (Utah App. 1993), cert. denied, 868 P.2d 95 (Utah 1993) (citing Pease v. Industrial Comm’n, 694 P.2d 613 (Utah 1984)).

There is no standard of review for an issue that has been waived. Appellate courts review *decisions* made and *actions* taken by lower courts. In order to preserve an issue for review “a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue’s merits.” LeBaron & Assoc., Inc. v. Rebel Enters., Inc., 823 P.2d 479, 482-83 (Utah Ct. App. 1991). Where a lower adjudicative body has not been afforded “an opportunity to rule” on the merits of an issue, an appellate court has nothing to review.

ISSUE 4. Were Petitioner’s Due Process rights violated when the Department of Commerce conditionally granted his request for Stay Pending Agency Review?

STANDARD OF REVIEW FOR ISSUE 4

Under the Utah Administrative Code, “[t]he standards for agency review correspond to the standards for judicial review of formal adjudicative proceedings. . . .” Utah Admin. Code R151-46b-12(7) (West 2005). An appellate court “shall grant relief only if . . . the agency has erroneously interpreted or applied the law.” Utah Code Ann. § 63-46b-16(4)(d) (West 2005). An agency’s legal disposition of constitutional issues is reviewed for correction-of-error. E.g., State in Interest of K.M., 965 P.2d 576, 578 (Utah Ct. App. 1998)

(“Constitutional issues, including that of due process, are questions of law which we review for correctness.”).

DETERMINATIVE STATUTES AND RULES

Utah Admin. Code R151-46b-12(7) (West 2006)

(7) Standard of Review. The standards for agency review correspond to the standards for judicial review of formal adjudicative proceedings, as set forth in Subsection 63-46b-16(4).

Utah Code Ann. § 63-46b-16(4) (West 2005)

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
- (b) the agency has acted beyond the jurisdiction conferred by any statute;
- (c) the agency has not decided all of the issues requiring resolution;
- (d) the agency has erroneously interpreted or applied the law;
- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
- (h) the agency action is:
 - (i) an abuse of the discretion delegated to the agency by statute;
 - (ii) contrary to a rule of the agency;
 - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
 - (iv) otherwise arbitrary or capricious.

STATEMENT OF FACTS/STATEMENT OF THE CASE

Petitioner Thompson (“Petitioner”) was initially licensed on February 21, 1989 to practice as a professional engineer in the state of Utah. R. 437. Nearly ten years later, in 1998, Petitioner prepared a cover letter and an addendum that were attached to a set of construction plans submitted to the Cedar City Building Department. R. 437-38. Petitioner had not drawn up the plans; they had been designed and created by a general contractor. R. 438. The letter states that Petitioner “reviewed the plans and approved the structure as shown on the plans.” R. 437-438. Petitioner not only signed the letter but also affixed his professional engineer seal to it. Id. The addendum Petitioner attached to the letter includes notes setting forth general engineering specifications. R. 438. The specifications set forth in the addendum did not conform to the Uniform Building Code (“UBC”). Id. Building officials reviewed the plans and concluded that they were not accurate or complete. Id.

The 1999 Order (Addendum A)

Petitioner was cited and ordered to appear at a September 1999 hearing before the Professional Engineers and Professional Land Surveyors Board (“Board”) of the Division of Occupational and Professional Licensing (“DOPL”). R. 436. The Board found that Petitioner had engaged in unprofessional conduct by affixing his professional engineer seal to plans that he had not personally prepared. R. 441. The Board further found Petitioner’s “substantial experience as a professional engineer” as well as his refusal to “acknowledge the wrongful nature of his misconduct” to be aggravating circumstances in their determination of appropriate disciplinary action. R. 443. The Board submitted

Findings of Fact, Conclusions of Law and Recommended Order (“Order”) to the Director of DOPL on October 27, 1999. R. 436. The Director adopted the Order on October 29, 1999. R. 435.

The Order recommended that Petitioner’s license be suspended, but that a stay of enforcement be entered and Petitioner’s license placed on probation for three years subject to certain terms and conditions. R. 444. The conditions required Petitioner to find a peer reviewer willing to review his work, provided for random audits of 20% of Petitioner’s work, scheduled regular meetings between Petitioner and the Board, and required that Petitioner complete the Utah Law and Rules Examination for professional engineers. R. 444-45.

The Order to Show Cause (Addendum B)

Over the course of the next three years Petitioner repeatedly failed to meet the conditions of the 1999 Order. As a result, on May 29, 2002 DOPL issued a Notice of Agency Action and Petition (Order to Show Cause) (“OSC”). R. 426. DOPL requested that Petitioner “be adjudged and decreed to have violated the provisions” of the 1999 Order. Petitioner was sent notice on June 3, 2002 that he had twenty days to file a written response to the OSC and that a hearing on the matter would be held July 29, 2002. R. 423-24. Petitioner failed to respond to the OSC within twenty days of being sent notice. R. 421. On July 12, 2002, well beyond the twenty-day limit, DOPL made a Motion for Default. R. 419.

During this time, Petitioner obtained counsel and was eventually granted leave by the Administrative Law Judge (“ALJ”) to file a response by August 12, 2002. R. 415. A prehearing teleconference for the purpose of determining whether the matter could be resolved by stipulation was scheduled for September 3, 2002. R. 416. That prehearing conference never took place, as DOPL and Petitioner agreed to settle the matter by stipulation. R. 410. The parties were given until October 15, 2002 to execute a written stipulation. R. 407.

The parties did not reach an agreement by October 15, 2002. R. 403. Finally, on September 2, 2004 the ALJ held a prehearing conference wherein counsel for DOPL and Petitioner informed the ALJ that they were still pursuing settlement negotiations. R. 404.¹ The ALJ granted ongoing leave to the parties to continue settlement negotiations, but also ordered Petitioner to file a written response to the OSC no later than September 17, 2004, ordered DOPL to provide its witness and exhibit list to Petitioner by September 30, 2004, and scheduled a prehearing teleconference for October 13, 2004 to assess progress toward resolving the matter by stipulation. R. 404-05. DOPL provided its witness and exhibit list to Petitioner on time. R. 359. Petitioner again failed to file a written response as mandated by the ALJ. R. 397-398.

DOPL filed a Motion for Default and Entry of Final Order and Memorandum on September 23, 2004. R.363. Petitioner provided a response to the OSC on September 29,

¹ The record does not disclose the reason for this gap in time.

2004, more than two years after the OSC was issued, consisting of a numerical list ostensibly correspondent to the OSC with either “Admit” or “Deny” next to most items. R. 342-44. On October 13, 2004 the ALJ conducted a prehearing teleconference with counsel representing DOPL and counsel representing Petitioner. R. 336. The ALJ acknowledged that Petitioner had again failed to timely file but denied DOPL’s Motion for Default, concluding that the case ought to be resolved on its merits. R. 337. Counsel for Petitioner stated that he expected that Petitioner would execute a proposed stipulation so as to avoid another hearing before the Board. Id. The ALJ ordered that the stipulation be submitted no later than October 18, 2004 and scheduled a prehearing teleconference for October 20, 2004 in case the matter had not been resolved by stipulation. Id. Counsel for Petitioner notified DOPL and the ALJ that he had withdrawn from the case on October 15, 2004. R. 355.

Counsel for DOPL and Petitioner participated in a prehearing conference held on October 20, 2004. R. 338. The ALJ noted that the next meeting of the Board would be conducted on November 10, 2004. Id. Petitioner informed the participants that he had potentially identified substitute counsel that would assist him during the Board meeting. Id. The ALJ ordered that the hearing would be held at the Board meeting of November 10, 2004 unless Petitioner’s counsel was unavailable that day, in which case the hearing would be held during the January 2005 Board meeting. R. 339.

The Stipulation and Order (Addendum C)

Petitioner's new counsel filed a Notice of Appearance of Counsel on November 3, 2004. R. 335. At a prehearing teleconference held on November 4, 2004 counsel for petitioner informed counsel for DOPL and the ALJ that he believed the case could be resolved by stipulation. R. 330. Counsel for Petitioner also informed the ALJ and counsel for DOPL that he would not be available to attend the Board meeting of November 10, 2004. R. 330-31. The ALJ accommodated Petitioner by rescheduling the hearing to coincide with the January 12, 2005 Board meeting. R. 331. The ALJ also granted leave to DOPL and Petitioner to pursue and attempt to finalize a stipulation until December 3, 2004. Id. The ALJ ordered that if no stipulation had been reached by that date, Petitioner would be required to provide witness and exhibit lists to DOPL no later than December 10, 2004. R. 332. DOPL had already provided witness and exhibit lists to Petitioner months prior. R. 359.

Petitioner filed a Motion to Extend Deadline for Respondent to Designate Witnesses and Hearing Exhibits on December 10, 2004. R. 327. Petitioner eventually filed a list of three witnesses on December 20, 2004. R. 326. On January 10, 2005 counsel for Petitioner filed a Motion to Withdraw as Counsel, stating that Petitioner had "failed to participate meaningfully in preparation for the hearing, ha[d] not produced any documentary evidence for the hearing and untimely designated witnesses for the hearing." R. 323.

Prior to the hearing of January 12, 2005, DOPL entered into a stipulation with Petitioner to resolve the matter. R. 314. The Stipulation and Order ("Stipulation") entered

into on January 12, 2005 represented “the full and final resolution of all allegations and claims raised” in the OSC. R. 315. The Stipulation outlined the conditions of the 1999 Order and expressed that Petitioner had failed to comply with that Order. R. 316. Under the Stipulation, the parties agreed that Petitioner’s license would be suspended for a minimum of four months from the effective date of the Stipulation, that date being thirty days after the stipulation was signed by the Director of DOPL. R. 315. Various other conditions similar to those of the original 1999 Order are outlined in the Stipulation, most of which include review of Petitioner’s work so as to ensure that “his work demonstrates an ability to safely practice as a professional engineer.” R. 316. On January 12, 2005 Dan S. Jones, Bureau Chief of DOPL, Lenore Epstein of the Utah Attorney General’s Office and Petitioner signed the Stipulation. R. 320.

Six days later, on January 18, 2005 Petitioner filed a “Rescission of Stipulation” for “Breech [sic] of Stipulation on the Part of [DOPL] and/or I rescind the before mentioned stipulation for cause.” R. 311. The “breach of Stipulation” to which Petitioner refers concerns the premature posting of his license as suspended on DOPL’s website, a mistake which was corrected immediately upon detection. R. 288. In all, Petitioner’s license was mistakenly listed as suspended on DOPL’s website for fewer than five days, after which the website accurately reflected that his license was “on probationary status” instead of suspended. Id.

Petitioner’s other grounds for rescinding the Stipulation, those Petitioner seemingly argues make the Stipulation rescindable “for cause,” include: A claim that the original

citation was motivated not by the fact that he affixed his professional engineer seal to plans that he had not prepared, plans which he had reviewed and expressly approved despite the fact that they were inaccurate, incomplete and not up to code, but instead that the citation was issued as a personal (and serendipitous) vendetta; a claim that the Board's holding that he had not aided in the unlicensed practice of architecture precluded it from holding that he had engaged in unprofessional conduct in affixing his seal to plans he had not prepared; a claim that DOPL obstructed Petitioner's ability to obtain an attorney to represent him in a hearing held on September 21, 1999 for a citation issued on May 15, 1998; a claim that Board members and DOPL spoke privately about his case; a claim that Petitioner was not allowed to use the witnesses and exhibits in the initial hearing of September 21, 1999; and a claim that the Order, the terms of which Petitioner violated, was vague and arbitrary and that Petitioner had complied with those requirements of the Order "which was [sic] in my control." R. 311-12.

Petitioner and counsel for DOPL participated in a teleconference on February 4, 2005 at which it was decided that oral argument on the matter would be heard on February 11, 2005. R. 304. After receiving evidence and hearing oral argument the ALJ issued its decision on February 16, 2005. R. 292. The ALJ recommended that Petitioner's request to rescind be denied. Id. The Director of DOPL adopted the recommendation the same day. R. 283. The next day Petitioner filed a "Directive to Compel a Stay of Stipulation Pending Appeal" in which he requested a stay of the Stipulation and indicated his desire to appeal the denial of his request to rescind. R. 281. The Utah Department of Commerce

(“Commerce”) promptly responded the following day in a letter that informed Petitioner that his requests were premature and explained the process he would need to follow in order to request a stay of the Stipulation and agency review of the decision to deny his motion to rescind. R. 279-80.

On March 18, 2005 Petitioner filed a Request for Agency Review challenging DOPL’s denial of his request to rescind the Stipulation. R. 266. On the same day, Petitioner made a Motion for Stay of Stipulation Pending Agency Review. R. 275. (Included here as Addendum D): On March 25, 2005 Petitioner again obtained counsel. R.265. DOPL and counsel for Petitioner held a scheduling teleconference on March 29, 2005 in which a timeline for filing documents relating to the stay and the agency review was established. R. 261.

On April 6, 2005 the Utah Department of Commerce (“Commerce”) issued an Order Regarding Stay Request that conditionally granted Petitioner’s Motion for Stay. R. 151 (Addendum E). The stay was issued subject to conditions similar in purpose and scope to those issued during the previous six years in the Order and in the Stipulation. R. 154-55. Petitioner responded by filing a “Second Request for Hearing” on his Request for Stay Pending Agency Review on April 11, 2005. R. 146. Commerce denied this request on April 14, 2005, pointing out that Petitioner had “identified no provision for a hearing on a request for a stay in the applicable rules” and that Commerce itself was “not aware of any such procedure.” R. 75. Petitioner responded on April 19, 2005 by making a “Third Request for Hearing” on his Request for Stay Pending Agency Review. R. 71. This request

was denied by Commerce on May 5, 2005. R. 47. Petitioner's counsel filed a Notice of Withdrawal of Counsel on May 12, 2005. R. 41.

Agency Review

During the course of this litigation Petitioner filed three affidavits. (R. at 68 , 85, 271). On April 22, 2006 DOPL made a Motion to Strike all three affidavits. R. 62. On August 4, 2005 Commerce issued Findings of Fact, Conclusions of Law, Order Granting Motion to Strike, and Order on Review("Order on Review"). R. 18 (included here as Addendum F). The Order on Review granted DOPL's motion to strike, holding that "all new factual information that Petitioner provides in his many affidavits and his memoranda on agency review, which was not initially raised before [DOPL], is an improper attempt to supplement [DOPL's] record." R. 26. The Order on Review further pointed out that "legal issues must be raised at the Division level in order to be properly preserved for agency review," and held that Petitioner's arguments "regarding the two-day rule, not being represented by counsel, being under the influence of medications, that [DOPL] coerced him into signing the Stipulation, etc." had not been properly preserved for review "[b]ecause Petitioner failed to bring these issues to [DOPL] at the time of the rescission hearing. . . ." R. 27. The Order on Review held that "[b]y his own failure to raise these arguments, Petitioner waived them," and that "[a]s a result, such arguments cannot now be considered on agency review." Id. (citing Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)).

The Order on Review then addressed the only issue properly before Commerce—“whether [DOPL] properly denied Petitioner’s motion to set aside the Stipulation. . . .” R. 28. The Order on Review treated Petitioner’s “Rescission of Stipulation” as “a motion for relief from judgment under Rule 60(b) of the Utah Rules of Civil Procedure.” Id. The Order on Review held that “[DOPL’s] and ALJ’s conclusions were reasonable in this case,” and thus DOPL and the ALJ had not abused their discretion. R. 29. In particular, the Order on Review held that the ALJ was reasonable in concluding that prematurely posting the status of Petitioner’s license as “suspended” instead of “on probation” did not constitute “fraud, . . . misrepresentation, or other misconduct” under 60(b)(3), but was instead “a clerical error or mistake.” R. 29-30.

The Order on Review held that Petitioner was not entitled to relief under 60(b), and ordered that “[t]he parties shall hereafter conduct themselves in accordance with the terms and conditions of the [January 12, 2005] Stipulation and Order.” R. 33. On August 25, 2005, twenty-one (21) days after entry of the Order on Review, Petitioner filed a Request for Reconsideration for Agency Review. R. 14. On that same day, Petitioner filed a petition for an extension of time to file that request. R. 16. Commerce denied the extension and Petitioner’s Request for Reconsideration on September 12, 2005 because it was not timely filed. R. 8. Petitioner filed a Notice of Appeal on September 6, 2005. R. 4.

On appeal, Petitioner raises the following as issues: First, whether the ALJ erred in denying Petitioner’s Due Process rights “in withholding and telling [Petitioner] that they cannot find the transcripts for the [1999] hearing” held before the Board; second, whether

the ALJ erred “in denying [Petitioner] his right to the DOPL’s administrative Two-Day Rule. . . .”; third, whether the ALJ erred when it “impaired the obligation of a stipulation or contract” in violation of U.S. Const. art. I, § 10; and fourth, whether the ALJ denied Petitioner Due Process of Law in denying Petitioner a “Stay of Action of the Stipulation of January 12, 2005 while the appeal is in process.” Petr.’s Br. 2-5.

SUMMARY OF ARGUMENT

Petitioner has waived his right to litigate the first three purported issues outlined in his brief. Petitioner claims first that he was not able to obtain transcripts from the 1999 hearing, second that DOPL violated the “two-day rule,” and third that DOPL violated the Constitution. Petr.’s Br. 2-5. Petitioner failed to mention any of these issues before the ALJ despite multiple chances to do so, and thus did not give the DOPL the chance to respond and the ALJ the opportunity to rule on these issues. As a result, he has waived his right to litigate these issues before the Department of Commerce and before this Court.

The Department of Commerce did not violate Petitioner’s right to due process of law when it conditionally granted his request for a stay pending agency review. Commerce did not deny Petitioner’s Request for Stay Pending Agency Review, as Petitioner claims in his brief. Petr.’s Br. 4. Commerce conditionally granted Petitioner’s request, and by so doing did not violate Petitioner’s rights to due process of law. Petitioner has no due process right to a full, unconditional stay of the DOPL order pending intra-agency review by the Department of Commerce. In any event, any issue arising from the motion for stay of

DOPL's order pending agency review by Commerce is moot because Commerce has made its decision, and a finding in Petitioner's favor would now have no effect.

ARGUMENT

I. THE FIRST ISSUE RAISED BY PETITIONER HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW

Petitioner has waived his right to litigate the first purported issue outlined in his brief, and this Court should refuse to consider it.

Petitioner first claimed that DOPL withheld transcripts of the 1999 hearing in his request of Judicial/Agency Review, dated March 18, 2005 (R. 267), two months after signing the Stipulation on January 12, 2005. R. 314. Petitioner made no mention of this claim at the January 12, 2005 meeting. He made no mention of this claim in his motion for "Rescission of Stipulation" that he filed on January 18, 2005, (R. 311), nor did he bring up this claim at the hearing regarding the motion for rescission held on February 11, 2005. He made no mention of this claim in his September 29, 2004 response brief to the Order to Show Cause. R. 342.

The matter was never brought to the ALJ's or DOPL's attention, and thus was not properly preserved for intra-agency review by Commerce. This court has held it "axiomatic in our adversary system that a party must raise an objection in an earlier proceeding or waive its right to litigate the issue in subsequent proceedings" and emphasized that "[t]his principle is not limited to the trial court setting, but applies equally to administrative hearings." Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Utah Ct.

App. 1990). Though he had ample opportunity to raise this claim with DOPL, Petitioner failed to do so. As a result, Commerce properly refused to consider the claim. Petitioner has waived his right to litigate this claim before this Court. See Badger v. Brooklyn Canal, 922 P.2d 745, 751 (Utah 1998) (“[T]he failure to make known the nature of one’s rights in the course of an administrative proceeding clearly disentitles a party from raising its claim for the first time before a district court on de novo review.”).

II. THE SECOND ISSUE RAISED BY PETITIONER HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW

Petitioner has waived his right to litigate the second purported issue outlined in his brief, and this Court should refuse to consider it.

Petitioner first claimed that DOPL had violated what he refers to as the “two-day rule” in a Supplemental Memorandum in support of his Request for Agency Review, dated April 13, 2005. R. 77.² Petitioner made no mention of this claim at the meeting on January 12, 2005. He made no mention of this claim in the “Rescission of Stipulation” that he filed on January 18, 2005, (R. 311), nor did he bring up this claim at the hearing regarding that motion held on February 11, 2005.

The matter was never brought to the ALJ’s or DOPL’s attention, and thus was not properly preserved for intra-agency review by Commerce. As mentioned previously, this Court has held that a party in an administrative hearing “must raise an objection in an

² The “rule” mentioned by Petitioner refers not to a rule, but instead to a line in the June 3, 2002 Notice of Agency Action and Order to Show Cause Hearing. R. 109. This “rule” appears nowhere else.

earlier proceeding or waive its right to litigate the issue in subsequent proceedings.”

Brinkerhoff 790 P.2d at 589. See also Brooklyn Canal, 922 P.2d at 751 (“[T]he failure to make known the nature of one’s rights in the course of an administrative proceeding clearly disentitles a party from raising its claim for the first time before a district court on de novo review.”). Petitioner had multiple opportunities to raise this claim before DOPL, but did not. As a result, Commerce properly refused to consider the claim. Petitioner has waived his right to litigate this claim before this court, and this court should refuse to consider it.

III. THE THIRD ISSUE RAISED BY PETITIONER HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW

Petitioner has waived his right to litigate the third purported issue outlined in his brief, and this Court should refuse to consider it.

Petitioner first claimed that DOPL had violated Article I, section 10 of the Constitution in his Request for Agency Review, dated March 18, 2005. R. 268. Petitioner made no mention of this claim at the meeting on January 12, 2005. He made no mention of this claim in the “Rescission of Stipulation” that he filed on January 18, 2005, (R. 311), nor did he bring up this claim at the hearing regarding that motion held on February 11, 2005 (Hearing Transcript).

The matter was never brought to the ALJ’s or DOPL’s attention, and thus was not properly preserved for intra-agency review by Commerce. This court has held that a party in an administrative hearing “must raise an objection in an earlier proceeding or waive its

right to litigate the issue in subsequent proceedings.” Brinkerhoff, 790 P.2d at 589. See also Brooklyn Canal, 922 P.2d at 751. Petitioner had multiple opportunities to raise this claim before DOPL, but did not. As a result, Commerce properly refused to consider the claim. Petitioner has waived his right to litigate this claim before this Court.

IV. THE DEPARTMENT OF COMMERCE DID NOT VIOLATE PETITIONER’S RIGHT TO DUE PROCESS OF LAW WHEN IT CONDITIONALLY GRANTED HIS REQUEST FOR STAY PENDING AGENCY REVIEW

Petitioner’s statement of the issue is ill-formed. Petitioner’s Request for Stay Pending Agency Review was not denied, as claimed in his brief. Petr.’s Br. 4. Petitioner’s request was conditionally granted. R. 151. (See Addendum E). Petitioner’s rights to due process of law were not violated when his request for Stay Pending Agency Review was conditionally granted and he rejected the ruling and refused to abide by the terms of the stay.

A party requesting agency review “may request that the effective date of the order subject to review be stayed pending the completion of review.” Utah Admin. Code R151-46b-12(4)(a). Petitioner filed a Motion for Stay of Stipulation Pending Judicial/Agency Review on March 18, 2005. R. 275. “The division or committee that issued the order subject to review may oppose the request for a stay in writing within ten days from the date the stay is requested.” Utah Admin. Code R151-46b-12(4)(b). DOPL timely filed an Objection to Stay on March 28, 2005. R. 264.

In deciding whether or not to grant a stay, the agency “shall review the division’s or committee’s findings of fact, conclusions of law and order to determine whether granting a stay would, or might reasonably be expected to, pose a significant threat to the public health, safety and welfare.” Utah Admin. Code R151-46b-12(4)(c). “The department may also issue a conditional stay by imposing terms, conditions or restrictions on a party pending agency review.” Id.

Commerce responded to Petitioner’s request for Stay Pending Agency Review and DOPL’s Objection to Stay by issuing an Order Regarding Stay Request on April 6, 2005. R. 151. In reviewing DOPL’s “findings of fact, conclusions of law and order” in accord with Administrative Rule 151, Commerce concluded that an unconditional stay “would not be in the best interests of the public.” R. 154. However, using its power to issue a conditional stay under Rule 151, Commerce held that “the public could be adequately protected with a conditional stay of [DOPL’s] Order with appropriate measures to monitor his practice.” Id. Commerce granted a stay contingent upon Petitioner’s compliance with seven requirements similar in purpose and scope to those found in the original 1999 Order. R. 154-55.

Having found that an unconditional stay “would not be in the best interests of the public,” Commerce was within its right to deny the stay altogether, but chose instead to exercise its discretion and provide a way to grant the stay and also protect the public. See Utah Admin. Code R151-46b-12(4)(c) (“The department *may* also issue a conditional stay by imposing terms, conditions or restrictions on a party pending agency review.”)

(emphasis added). Petitioner refused to accept the condition of the stay, instead responding with a “Second Request for Hearing” (R. 146), followed by a “Third Request for Hearing” on the matter. R. 71.

Under Utah’s Administrative Procedures Act, when reviewing final agency action resulting from formal adjudicative proceedings, an appellate court “shall grant relief only if, on the basis of the agency’s record, it determines that a person seeking judicial review has been substantially prejudiced” by the agency action, by an erroneous interpretation of law on part of the agency, etc. or if the agency action is an abuse of discretion, contrary to a rule of the agency, or otherwise arbitrary and capricious. Utah Code Ann. § 63-46b-16(4) (West 2005) (certain provisions omitted). Commerce did not erroneously interpret the law. Commerce closely followed Rule 151 of the Utah Administrative Code, and even exercised its discretion in finding a way to conditionally grant Petitioner’s request.

Petitioner was not substantially prejudiced when Commerce conditionally granted this request, and that action was far from arbitrary and capricious. Petitioner has cited no authority, and Respondent has found none, to support the proposition that litigants have a due process right to a full, unconditional stay of final judgments. Utah rules use discretionary language in instructing adjudicative bodies regarding stays pending review. See Utah R. App. P. 8 (“*Application* for a stay . . .; to determine whether *granting* a stay would. . .; motion will show the reasons for the relief *requested*. . .”); Utah Admin. Code R151-46b-12(4) (“. . . the party seeking review may *request* that the effective date of the order. . .”) (emphases added). The language used in judicial opinions similarly relies on the

assumption that stays pending review are granted or denied at their discretion. See, eg., Lane v. Messer, 689 P.2d 1333, 1334 n.1 (Utah 1984) (“Whether the relationship between the parties and issues involved in the appeal and those remaining before the trial court might warrant a stay of the trial court proceedings pending the appeal is a matter for the sound discretion of the trial court, a matter upon which we express no view.”); Jensen v. Schwendiman, 744 P.2d 1026 (Utah Ct. App. 1987) (denying litigant stay request because appellant did not convincingly show that he was likely to succeed on the merits on appeal).

Furthermore, a due process right to a stay pending agency review would make “final” judgments contingent upon completion of the appellate review process, rendering them less than final.

In any event, any issue arising from the motion for stay of DOPL’s order pending agency review is moot. Agency review has come and gone, and Petitioner has made no request for a stay of Commerce’s decision. A finding in favor of Petitioner on this issue can provide him no relief. The Utah Supreme Court has held that “[a]n issue on appeal is considered moot when the requested judicial relief cannot affect the rights of the litigants.” State v. Vicente, 2004 UT 6, ¶ 3, 84 P.3d 1191 (internal citations omitted). The judicial relief requested by Petitioner cannot affect his rights, and this Court should not address this moot issue.


CONCLUSION

For the foregoing reasons, Respondent asks the Court to affirm the agency's order denying Petitioner's request to set aside his Stipulation.

STATEMENT REGARDING ORAL ARGUMENT

Respondent does not request oral argument and a published opinion in this matter. The questions raised in this appeal are not such that oral argument or a published opinion is necessary, though respondent desires to participate in oral argument if such is held by the Court.

Respectfully submitted this 12th day of June, 2006.


ANNINA MITCHELL
Utah Solicitor General
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Respondent, postage prepaid, to the Petitioner this 12th day of June, 2006:

ANTONE RODNEY THOMPSON
350 S. 500 W.
Cedar City, Utah 84720



ADDENDUM “A”

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSE OF	:	
ANTONE R. THOMPSON	:	FINDINGS OF FACT
TO PRACTICE AS A PROFESSIONAL ENGINEER	:	CONCLUSIONS OF LAW
IN THE STATE OF UTAH	:	AND RECOMMENDED ORDER
	:	Case No. DOPL-98-105.

Appearances:

Jeffrey C. Hunt for the Division of Occupational and
Professional Licensing

Antone R. Thompson for Respondent

BY THE BOARD:

A September 21, 1999 hearing was conducted in the above-entitled proceeding before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Professional Engineers and Professional Land Surveyors Board. Members of the Board present were Charles Henry Richardson, Barry C. Anderson, Robert Knox, Hardin A. Whitney, Scott F. McNeil and Stanley S. Postma.

The remaining Board member (Kenneth Lawrence DeVries) was not present when the hearing began. Accordingly, Mr. DeVries did not participate as a Board member in this proceeding. A. Gary Bowen, Director of the Division of Occupational and Professional Licensing, joined the hearing in progress.

Thereafter, evidence was offered and received. The Board,

being fully advised on the premises, now enters its Findings of Fact, Conclusions of Law and submits the following Recommended Order for review and action by the Division:

FINDINGS OF FACT

1. Respondent is, and at all time relevant to this proceeding has been, licensed to practice as a professional engineer in this state. Respondent was initially licensed on February 21, 1989.

2. John Pace, a Cedar City businessman, submitted a set of commercial construction plans to the Cedar City Building Department on January 25, 1998 to obtain a building permit. The plans were construction drawings for a new warehouse and showroom designed as an addition to an existing structure.

3. Glenn Scott Jensen, a licensed general contractor, had prepared the just-described plans at the request of Mr. Pace. Mr. Jensen is not licensed as an engineer or architect. The construction drawings which Mr. Jensen prepared do not contain the seal of any licensed professional engineer or architect.

4. The construction plans which Mr. Pace submitted to the Cedar City Building Department included a January 14, 1998 cover letter, prepared by Respondent, which recites that Mr. Jensen had contacted Respondent to provide engineering services relative to the construction plans. The letter recites Respondent "reviewed the plans and approved the structure as shown on the plans".

5. Respondent signed the January 14, 1998 letter and he

also affixed his professional engineer seal to that letter. Respondent attached a six (6) page addendum to the letter. The attachment consists of generic notes which set forth general engineering specifications relative to concrete, steel, masonry and wood materials.

6. The various specifications set forth in the attachment to the January 14, 1998 letter indicate those specifications would conform to the 1994 edition of the Uniform Building Codes. However, the 1997 Code edition governed all construction in Utah when the plans in question were submitted to the Cedar City Building Department. The specifications set forth in the general notes attached to those plans are not consistent with those 1997 Code requirements.

7. Based on the substantial and credible evidence presented, Mr. Jensen designed and prepared the construction plans in question without Respondent's supervision or oversight. An engineer's review and seal of those plans was required to obtain a Cedar City building permit. Based on the substantial and credible evidence presented, and the reasonable inferences drawn therefrom, the January 14, 1998 letter constitutes Respondent's approval of the plans as drawn by Mr. Jensen.

8. Cedar City building officials reviewed the plans and determined they were not accurate and complete. Accordingly, no building permit was issued based on those plans.

CONCLUSIONS OF LAW

U.C.A. §58-1-401(2) provides the Division may revoke, suspend, restrict, place on probation, issue a public or private reprimand to, or otherwise act upon the license of any licensee who:

- (a) . . . has engaged in unprofessional conduct, as defined by statute or rule under this title;
- (b) . . . has engaged in unlawful conduct as defined by statute under this title.

Section 58-1-501(1)(a) generally defines unprofessional conduct to include:

- . . . practicing or engaging in, representing oneself to be practicing or engaging in, or attempting to practice or engage in any occupation or profession requiring licensure under this title if the person is:
 - (i) not licensed to do so or not exempted from licensure under this title . . .

The Division asserts Respondent engaged in unlawful conduct because he aided and abetted the unlicensed practice of architecture when: (1) he approved the construction plans and affixed his seal on a letter of verification pertaining to the structural engineering of those plans; (2) he provided specifications to the plans which were not drawn by a licensed architect or professional engineer; and (3) he affixed his seal to plans which were not prepared under his supervision.

However, the Board finds and concludes Respondent would not have been engaged in the unauthorized practice of architecture

had he directly prepared the plans in question. Such work would have been incidental to the proper scope of Respondent's practice as a professional engineer.

Thus, no proper legal basis exists to find and conclude Respondent aided and/or abetted the unlicensed practice of architecture merely because he approved the construction plans, affixed his seal to a letter of verification pertinent to those plans, provided specifications to the plans which were not prepared by a licensed architect or professional engineer and affixed his seal to the plans which were not prepared under his supervision. Accordingly, the Board finds and concludes Respondent has not violated §58-1-501(1)(a) and no proper basis exists to conclude he was engaged in any unlawful conduct relative to the foregoing matters.

The Division next asserts Respondent engaged in unprofessional conduct because he aided and abetted the unlicensed practice of architecture when he knowingly approved and affixed his seal to construction plans which had been prepared by an unlicensed person not under his supervision. Consistent with the above-stated analysis, the Board similarly concludes no legal basis exists to find that Respondent was engaged in such unprofessional conduct violative of §58-1-501(2)(a).

However, §58-1-501(2) defines unprofessional conduct to include:

(g) practicing . . . an occupation or profession regulated under this title through gross incompetence, gross negligence or a pattern of incompetency or negligence.

§58-22-603 sets forth the manner in which a professional engineer or professional structural engineer is authorized to use a seal, to wit:

(1) A professional engineer or professional structural engineer may only affix the licensee's seal to a plan, specification, and report when the plan, specification and report:

(a) was personally prepared by the licensee;

(b) was prepared by an employee, subordinate, associate, or drafter under the supervision of a licensee, provided the licensee or principal affixing his seal assumes responsibility.

Moreover, §58-22-102(16) further provides:

"Supervision of an employee, subordinate, associate, or drafter of a licensee" means that a licensed professional engineer, professional structural engineer, or professional land surveyor is responsible for and personally reviews, corrects when necessary, and approves work performed by any employee, subordinate, associate, or drafter under the direction of the licensee, and may be further defined by rule by the division in collaboration with the board.

R156-22-102 thus provides:

(11) "Unlicensed employees, subordinates, associates, or drafters of a person licensed under this chapter" means persons not licensed as a professional engineer who perform professional engineering . . . services under the direct supervision of a licensed professional engineer . . . and who do not offer professional engineering or

professional land surveying services directly to the public.

The structural engineering services which Respondent provided and the specifications which he submitted with the January 14, 1998 letter are critically deficient in numerous respects. The drawings are inaccurate and totally inadequate as to permit any structure to be properly built according to those specifications. Thus, Respondent engaged in grossly negligent conduct violative of §58-1-501(2)(g). Such conduct constitutes an extreme departure from the standards of practice governing all professional engineers.

Further, Respondent violated §58-22-603(a) when he affixed his seal to the construction drawings in question when he had not prepared those drawings and the drawings had not been otherwise prepared under his supervision. Accordingly, a further factual and legal basis exists to enter a disciplinary sanction as to Respondent's license.

The Board duly notes Respondent's urgence that he assumed Cedar City building officials would contact him after they had reviewed the plans and specifications to thus identify any deficiencies which they noted as to prompt subsequent changes or additions to those plans and/or specifications. Nevertheless, Respondent's January 14, 1998 letter unambiguously recites that he reviewed the plans and he approved the structure as shown on those plans.

Given the numerous deficiencies in the plans and specifications, the Board readily finds and concludes Respondent either did not understand or he cavalierly ignored the fact that he has no authority to approve plans. Moreover, Respondent failed to either prepare plans and specifications which were sufficient as to possibly prompt the subsequent issuance of a building permit or he failed to supervise the preparation of such plans and specifications.

Respondent cursorily reviewed the plans prepared by Mr. Jensen and affixed his seal to the plans without any meaningful review of those plans. Further, Respondent merely attached generic specifications to the plans. Given his wholly inadequate review of the plans and his entirely unwarranted reference to boiler plate specifications that did not comply with governing Code requirements, Respondent knew or should have know that he could not affix his seal to those plans.

There are two aggravating circumstances which must be considered regarding the disciplinary sanction which should be entered in this proceeding. Respondent is either unable or refuses to acknowledge the wrongful nature of his misconduct. Moreover, Respondent has substantial experience as a professional engineer. Accordingly, he should have been well aware of the nature of review or supervision necessary as to warrant any submission of the plans and specifications. Respondent's sealing of the plans was completely unjustified.

The Board thus concludes the Recommended Order set forth below is necessary to address Respondent's egregious failure to comply with the well-recognized standards which govern all professional engineers in this state. The Board concludes Respondent's continuing practice as a professional engineer must be adequately monitored to protect the public. The Board cautions Respondent that ongoing compliance with the requirements of the Recommended Order set forth below is essential to maintain his opportunity to continue practicing as a professional engineer in this state.

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED Respondent's license to practice as a professional engineer in this state shall be suspended. However, a stay of enforcement shall enter as to that suspension and Respondent's license shall be placed on probation for three (3) years, subject to the following terms and conditions:

(1) Within two months after this Recommended Order becomes effective, Respondent shall submit a written proposal to the Board which identifies a peer reviewer who is available and willing to generally review any structural or civil engineering services which Respondent may subsequently provide.

(2) The just-stated written proposal shall also provide for random audits of 20% of the work performed by Respondent during the previous six (6) months. Respondent shall bear the cost of such audits. The plan shall further provide for similar ongoing audits to be conducted every six (6) months. Audit reports shall be provided to the Board every


six months to reflect the work which has been reviewed and whether that work has been performed consistent with the standards which govern professional engineers in this state.

(3) Respondent shall meet with the Board during the next regularly scheduled Board meeting conducted after this Recommended Order becomes effective. Respondent shall thereafter meet with the Board every six (6) months. The Board may modify the frequency of those meetings as subsequently warranted.

(4) Within three months from the date this Recommended Order becomes effective, Respondent shall successfully complete the Utah Law and Rules Examination for professional engineers. Documentation shall be provided to the Division to thus establish that Respondent has timely satisfied the just-stated requirement.

Should Respondent fail to comply with the above-stated terms and conditions or otherwise violate any statute or rule which governs the practice of professional engineers in this state, further proceedings shall be conducted and a determination made whether the stay of enforcement set forth herein should be vacated and the suspension of Respondent's license become effective.

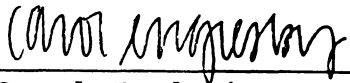
On behalf of the Professional Engineers and Professional Land Surveyors Licensing Board, I hereby certify the foregoing Findings of Fact, Conclusions of Law and Recommended Order were submitted to A. Gary Bowen, Director of the Division of Occupational and Professional Licensing, on the 27th day of October, 1999 for his review and action.


J. Steven Eklund
Administrative Law Judge

MAILING CERTIFICATE

I hereby certify that on the 3 day of June, 2002, a true and correct copy of the foregoing PETITION AND NOTICE OF AGENCY ACTION AND ORDER TO SHOW CAUSE HEARING was sent first class mail, postage prepaid, to the following:

Antone R. Thompson
350 South 500 West
Cedar City UT 84720



Carol Inglesby
Administrative Assistant

ADDENDUM “B”

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
160 East 300 South – Box 146741
Salt Lake City, Utah 841114-6741
Telephone: (801) 530-6628

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSE OF :	
ANTONE R. THOMPSON	:
TO PRACTICE AS A	:
PROFESSIONAL ENGINEER	:
IN THE STATE OF UTAH	:

P E T I T I O N
(Order to Show Cause)
CASE NO. DOPL-2002-123

PRELIMINARY STATEMENT

These claims were investigated by the **Utah Division of Occupational and Professional Licensing** ("Division") upon complaints that **Antone R. Thompson, P.E.** ("Respondent"), a licensee of the Division, has engaged in acts and practices which constitute violations of the Division of Occupational and Professional Licensing Act, UTAH CODE ANN. §§ 58-1-101 to 58-1-504 (1998) and the Division's Order in Case No. 98-105.

PARTIES

1. The Division is a division of the Department of Commerce of the State of Utah as established by UTAH CODE ANN. § 13-1-2 (1998).
2. At all times material to the allegations contained herein, Respondent was licensed by the Division as a Professional Engineer.

STATEMENT OF ALLEGATIONS

3. a. On or about October 29, 1999, the Division issued an Order in Division Case No. 98-105 (the "Order") suspending Respondent's license.

That suspension was, however, stayed in favor of a three (3) year term of probation with conditions. These terms and conditions included:

1. Within two months of the effective date of the order, Respondent was required to submit a written proposal to the Professional Engineers and Professional Land Surveyors Licensing Board (the "Board") that identified a peer reviewer available and willing to generally review structural or civil engineering services that Respondent was subsequently to provide.
2. The proposal was to provide for random audits of 20% of the work performed by Respondent during the previous six (6) months. Audit reports were to be provided to the Board every six months to reflect the work reviewed and whether the work was performed consistent with the standards, which govern professional engineers in the state of Utah.
3. A requirement that Respondent meet with the Board during the next regularly scheduled Board meeting conducted after the order became effective. He was also ordered to meet with the Board every six (6) months thereafter, subject to any modification of the frequency of those meetings as subsequently warranted.
4. Within three months of the effective date of the order, Respondent was to successfully complete the Utah Law and Rules Examination for professional engineers. Documentation of this to be provided to the Division to establish the timely satisfaction of the requirement.

See Findings of Fact, Conclusions of Law and Recommended Order and Order in Division Case No. 98-105, which is attached and incorporated by this reference as Exhibit A.

b. On or about January 18, 2000, Respondent met with the Board for his probationary interview. The Board reviewed the order and advised Respondent to seek legal counsel if he had questions about the order and

probation. Respondent was also advised of the requirement to submit a list of names and resumes of professional engineers for the board to review for a supervisor/auditor within 60 days of the date the Order was signed. A minimum of three names and resumes was requested immediately as Respondent was out of compliance with the order. The 60-day period required by the order passed on or about December 27, 1999.

c. On or about July 18, 2000, in a probation meeting with the Board, the board again notified Respondent that he was out of compliance with the Order. The Board requested Respondent to submit by August 1, 2000, a complete list of his engineering projects he had engaged in during probation. In the absence of an approved reviewer, the Board determined to review the list and randomly select projects for its review. The Board again requested Respondent to submit by August 1, 2000 a list of a minimum of three names of licensed engineers with their resumes for the Board to use in selecting a qualified reviewer to monitor Respondent's engineering projects. The Board suggested to Respondent that should he obtain employment as a professional engineer, the Division might be willing to amend the Order to allow his supervisor to submit reports regarding Respondents work in lieu of audit reviews.

d. On or about September 12, 2000, Respondent submitted the requested list of his engineering projects to the Board and requested a revision of the Order to allow an employer to be his auditor and reviewer should he obtain employment as an engineer. Since Respondent was not employed as a professional engineer, the Board declined to advise the Division to issue an

amendment to the Order. The Board again requested Respondent to come into compliance with the Order and submit a minimum of three names and resumes for the board to consider at its October 31, 2000 meeting.

e. On or about October 31, 2000, Respondent met with the Board for his probationary interview. Respondent requested the Order be revised for an employer to be his supervisor. The Board determined that Board members Scott McNeil, Stanley Postma, and Kim Harris would each review one file and report to the board. The Board again declined to recommend a modification of the Order because Respondent was not employed by a professional engineering firm. The Board again requested the names and resumes of three engineers for it to consider in designating an auditor and reviewer of Respondent's engineering projects.

f. On or about January 16, 2001, Board members McNeil and Postma reported the Board on their reviews of Respondent's engineering design documents. They concluded that the design documents provided by Respondent were incomplete and could not be used to evaluate his engineering work.

g. On or about July 17, 2001, Respondent arrived at the Board Meeting for a probation interview. Respondent claimed he was ill, so his interview was rescheduled to the next meeting.

h. On November 6, 2001, Respondent met with the Board for his probation interview. He submitted his law and rule examination for Board review. The Board discussed Respondent's non-compliance with the Order with him. The Board told Respondent the law and rule exam was not submitted within

60 days of the issuance of the Order, as required by the Order. The Board also again told Respondent it had not received a written proposal of a peer reviewer, as required within 60 days of the issuance of the Order and had not received reports from an authorized auditor on the review of 20% of his engineering projects.

i. On or about February 12, 2002, the Division mailed a Letter of Notice to Subject advising Respondent of the requirements for complying with the terms and condition of the Order. Respondent subsequently confirmed receipt of the letter in a telephone conversation with Division Bureau Manager Lynn Bernhard. Respondent further told Bernhard he had no questions about the letter or requirements outlined in it.

j. On March 19, 2002, Respondent appeared before the Board without the information required by the Order.

APPLICABLE LAW

4. The Division may revoke, suspend, restrict, place on probation, issue a public or private reprimand, or otherwise act upon the license of any licensee who:

- (a) . . . has engaged in unprofessional conduct, as defined by statute or rule under this title;

UTAH CODE ANN. §§ 58-1-401(2)(a) (1998).

5. "Unprofessional conduct" is defined to include:

- (a) violating . . . any statute, rule or order regulating an occupation or profession under this title.

UTAH CODE ANN. §§ 58-1-501(2)(a) (1998).

COUNT I

VIOLATING A DIVISION ORDER

7. Paragraphs 1 through 6 are incorporated by reference as if fully stated herein.

8. The Order in Division Case No. 98-105 provides in relevant part as follows:

Should Respondent fail to comply with the above-stated terms and conditions or otherwise violate any statute or rule which governs the practice of professional engineers in this state, further proceedings shall be conducted and a determination made whether the stay of enforcement set forth herein should be vacated and the suspension of Respondent's license become effective.

9. Respondent failed to meet the terms and conditions of the Order in Division Case No. 98-105, as described in Paragraph 3. Therefore cause exists to impose the suspension stayed in the Order in accordance with the just-stated provisions of that Order.

COUNT II

UNPROFESSIONAL CONDUCT

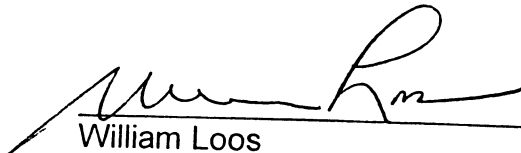
10. Paragraphs 1 through 9 are incorporated by reference as if fully stated herein.

11. Respondent failed to comply with a Division Order, as described in Paragraph 3. Therefore, Respondent has engaged in "unprofessional conduct" as defined UTAH CODE ANN. § 58-1-501(2)(a) (1998), thus providing a basis to impose new sanctions against Respondent's license under UTAH CODE ANN. § 58-1-401(2)(a) (1998).

WHEREFORE, the Division requests the following relief:

1. That Respondent be adjudged and decreed to have engaged in the acts alleged herein;
2. That by engaging in the above acts, Respondent be adjudged and decreed to have violated the provisions of the Division of Occupational and Professional Licensing Act and the Division's Order in case No. 98-105;
3. That an Order be issued imposing the sanctions stayed under the Order in Division case No. 98-105; and
4. That additional sanctions be imposed against Respondent's license in accordance with UTAH CODE ANN. § 58-1-401 (1998).

DATED this 29th day of may, 2002.



William Loos
Assistant Attorney General

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On the 30TH day of MAY, 2002, personally appeared before me
Robert Downard who, after being duly sworn, deposes and says that he has read
the foregoing Petition and knows the contents thereof, that the same is true to
the best of his knowledge except as to matters stated on information and belief
and that, as to those matters, he believes them to be true.

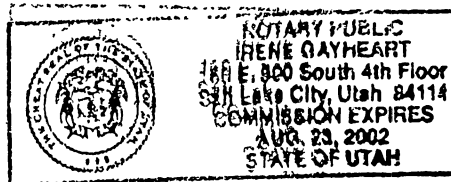
Robert Downard
Robert Downard
Investigator
Division of Occupational &
Professional Licensing

SWORN AND SUBSCRIBED to before me this 30th day of May, 2002.

Irene Gayheart
NOTARY PUBLIC

My Commission Expires:

Aug 23, 2002



ADDENDUM “C”

LENORE EPSTEIN (USB 6723)
ASSISTANT ATTORNEY GENERAL
MARK L. SHURTLEFF (USB 4666)
ATTORNEY GENERAL
Counsel for the Division of Occupational
and Professional Licensing
Heber M. Wells Building, 5th Floor
160 East 300 South - Box 140872
Salt Lake City, Utah 84114-0872
Telephone: (801) 366-0310

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

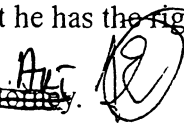
IN THE MATTER OF THE LICENSE OF
ANTONE RODNEY THOMPSON TO
PRACTICE AS A PROFESSIONAL
ENGINEER IN THE STATE OF UTAH

STIPULATION AND ORDER

CASE NO. DOPL-2002-123

Antone Thompson ("Respondent") and the Division of Occupational and Professional Licensing ("Division") stipulate and agree as follows:

1. Respondent is a Professional Engineer licensed by the Division.
2. Respondent admits the jurisdiction of the Division over him and over the subject matter of this action.
3. Respondent acknowledges that he enters into this Stipulation knowingly and voluntarily, and that other than what is contained in this agreement, no promise or threat has been made by the Attorney General, the Division, or any member, officer, agent or representative of the Division or the Attorney General to induce him to enter into this agreement.

4. The Respondent understands that he has the right to be represented by counsel in this matter ~~and has retained Hal Reiser as his attorney.~~ 

5. Respondent understands he is entitled to hearing before the Professional Engineers and Professional Land Surveyors Licensing Board ("the Board"), at which time he may present evidence on his own behalf, call witnesses, and confront adverse witnesses. Respondent acknowledges that by executing this document he waives the right to a hearing and any other rights to which he may be entitled in connection with said hearing.

6. A Notice of Agency Action and Order to Show Cause have been issued in this matter, and the Division and the Respondent agree that this Stipulation and Order shall be the full and final resolution of all allegations and claims raised in the Order to Show Cause. If the Stipulation is adopted by the Director of the Division, no further action shall be taken by the Division based upon the allegations and claims raised in the Order to Show Cause.

7. Respondent acknowledges that this Stipulation and Order, if adopted by the Director of the Division, will be classified as a public document. The terms and conditions of the Stipulation and Order will be effective thirty days after the date it is signed by the Director.

8. The Division alleges the following:

a. On October 29, 1999, the Division entered an Order pursuant to a hearing held on September 21, 1999. The Order suspended Respondent's license, but stayed the suspension in favor of a three year period of probation under the following terms and conditions:

i. Within two months of the date of the Order, Respondent was required to submit a written proposal to the Board identifying a peer reviewer available and willing to generally review structural or civil engineering services that Respondent would subsequently provide;

ii. The proposal was to provide for random audits of 20% of the work performed by Respondent during the previous six months. Audits were to be provided to the Board every six months to reflect the work reviewed

and whether the work was performed in a manner consistent with the standards governing professional engineers in Utah;

iii. The Respondent was required to meet with the Board at the next regularly scheduled Board meeting after the Order became effective and every six months thereafter, subject to any necessary modification that was warranted; and

iv. Within three months of the effective date of the Order, Respondent was to successfully complete the Utah Law and Rules Examination for Professional Engineers and provide documentation of the timely satisfaction of this requirement.

b. Respondent failed to comply with the Order in the following respects:

i. Respondent failed to provide the name of a qualified peer reviewer within two months of the effective date of the Order.

ii. Respondent failed to provide audits by a peer reviewer of any work performed by him during the prior six months or at any time during probation.

iii. Respondent completed the Utah Law and Rules Examination for Professional Engineers on November 6, 2001, almost two years after it was due under the Order.

9. Respondent claims that the terms of the Board's September 21, 1999 Order were unclear or ambiguous to him.

10. As a full settlement of all issues raised in the Order to Show Cause, Respondent agrees that the following Order may be entered in this matter.

a. Respondent's license to practice as a Professional Engineer shall be suspended for a minimum of four months from the effective date of this Order. The suspension shall be lifted only upon satisfactory completion of the requirements of paragraph 10.c. below and a determination by the Board that his work demonstrates an ability to safely practice as a professional engineer. Respondent's license shall thereafter continue on probation and shall be subject to all terms and conditions of this Stipulation and Order until three years from the effective date of this Order unless those terms and conditions are modified by a written order of the Division or the Board.

b. Respondent shall meet with the Bureau Manager or his designee within 30 days of the effective date of this Order. Respondent shall meet with the Board at its next regularly scheduled meeting thereafter to review the terms and conditions of this Stipulation and Order. Thereafter, Respondent shall meet with the Board as requested by the Division or the Board.

c. After four months from the effective date of this Order, Respondent may make a written request to the Division that the suspension be lifted. The Division, with advice from the Board, shall review his request and determine whether his compliance with this Order and the competence of his engineering work warrant the lifting of the suspension. Any request to lift the suspension shall include the following:

(1) A written list of all engineering projects Respondent has performed since October 2, 2002. The project list shall specify the name of the project, the type of work, the client or the owner of the project, the start and estimated completion date, the names and contact information of the building officials, and the fee earned.

(2) Copies of tax returns or other competent third-party documentation allowing the Division to ensure that all engineering projects he has undertaken during the period covered by his project list are included on the lists.

(3) The name of a Professional Engineer who has a license which is active and in good standing, who does not have a conflict of interest in reviewing his work and who is qualified in the area of the reviews to be made. The reviewer shall be instructed to provide a copy of all audits of Respondent's work to the Division.

(4) Reviews of twenty percent (20%) of the engineering projects on the project list. The projects chosen shall consist of a representative sample of the Respondent's areas of engineering practice. Each review shall include the following:

i. A certification that the reviewing engineer has no conflict of interest in performing the review, does not have a prior relationship with Respondent that raises a potential conflict of interest.

ii. A summary of the reviewing engineer's qualifications and expertise that enable him to review Respondent's work.

iii. Whether the material submitted for review was sufficiently accurate and complete to allow the reviewer to adequately judge the quality of Respondent's work.

iv. Whether Respondent's work met standards of practice for Professional Engineers and complied with statutory and regulatory requirements for the profession.

v. Whether clients and third parties were provided with complete and accurate documentation of the Respondent's work.

vi. How the reviewer chose projects for review, and whether Respondent failed to provide sufficient documentation of any projects chosen by the reviewer to enable him to evaluate Respondent's work on the projects.

vii. Whether the projects reviewed reflect an ability by the Respondent to engage in a variety of engineering practices or only a limited area of engineering practice.

viii. Recommendations by the reviewer regarding whether Respondent's work should be subject to increased review or should be restricted to certain areas of practice.

(5) After the suspension of his license has been lifted, Respondent shall maintain the project list and keep it current throughout the term of probation.

(6) Beginning four months after the effective date of this Order, Respondent shall provide a copy of the updated list to the Division every six months.

(7) After the suspension has been lifted and for the remaining period of probation, Respondent shall submit a report to the Division every six (6) months. The report shall consist of all of the information listed in paragraphs 10c(2), 10c(3), and 10c(4)(i) through 10c(4)(viii).

11. Respondent acknowledges that it is his responsibility to document competent practice and to provide sufficient reviews and documentation of his work to demonstrate competent practice. Respondent further acknowledges that this Stipulation and Order does not constitute a guarantee or promise that the suspension of his license will be lifted.

12. Respondent shall promptly notify the Division of any change of home or work address or of any change in employment. Should Respondent not engage in the

practice of professional engineering for more than sixty (60) days, the Division may elect not to apply any such time to the period of probation.

13. Should Respondent leave the state of Utah to reside or work for more than thirty (30) days, he shall promptly notify the Board in writing of his mailing address, and shall immediately notify local or state licensing authorities of the provisions of this Order. Time spent outside the state of Utah shall not apply to the probationary period.

14. Respondent shall maintain a current license to practice as a professional engineer at all times during the period of probation.

15. Respondent shall comply with all statutes and regulations governing his practice as a Professional Engineer, and shall comply with the standards of practice for Professional Engineers in the state of Utah. Failure to comply with any provision of this Order or to demonstrate competence to practice as a Professional Engineer may result in further disciplinary action.

16. Respondent acknowledges that knowingly providing false information to the Division is a violation of this Order. If after reasonable effort the Division determines that compliance with the terms and conditions of the Order are frustrated because of missing or incorrect information, Respondent shall supplement or correct information within fifteen (15) days after the mailing of a request by the Division.

17. If Respondent successfully completes the terms and conditions of his probation, his probation shall end and all terms and conditions shall be lifted by written order of the Division.

18. This Stipulation and Order, upon approval by the Director of the Division, shall be the final compromise and settlement of this matter. Respondent acknowledges that the Director

is not required to accept the terms of this Stipulation and Order and that if the Director does not do so, this Stipulation and the representations contained therein shall be null and void, except that the Division and the Respondent waive any claim of bias or prejudgment Respondent might have with regard to the Director by virtue of his having reviewed this Stipulation. This waiver shall survive such nullification.

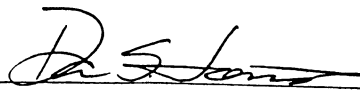
19. This document constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, understandings or agreements between the parties regarding the subject of this Stipulation and Order. There are no verbal agreements that modify, interpret, construe or affect this Stipulation.

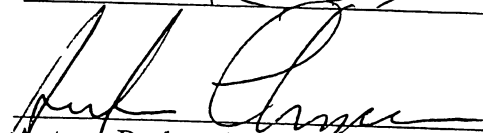
DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING

RESPONDENT

DATE: 1-12-5

DATE: Jan. 12 05

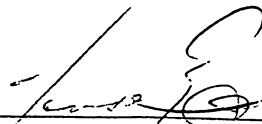
BY: 
Dan S. Jones
Bureau Chief

BY: 
Antone Rodney Thompson
Respondent

DATE: January 12, 2005

DATE: _____

MARK L. SHURTLEFF
ATTORNEY GENERAL

BY: 
Lenore Epstein
Assistant Attorney General

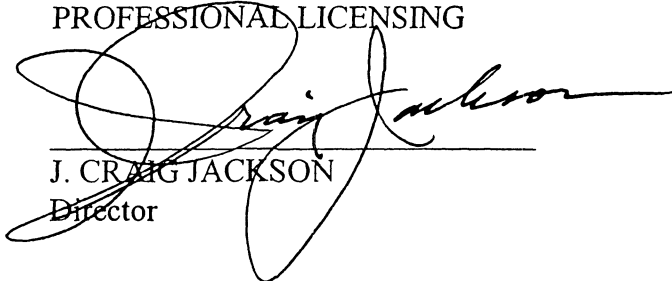
BY: ~~Hal Reiser~~ Not present
~~Attorney for Respondent~~

ORDER

THE ABOVE STIPULATION, in the matter of Antone Rodney Thompson, is hereby approved by the Division of Occupational and Professional Licensing, and constitutes my *Findings of Fact and Conclusions of Law* in this matter. The terms and conditions of the Stipulation are incorporated herein and constitute my final Order in this case.

DATED this 12th day of January, 2005.

DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING




J. CRAIG JACKSON
Director

MAILING CERTIFICATE

I hereby certify that on the 13 day of January, 2005,
a true and correct copy of the foregoing STIPULATION AND ORDER
was sent first class mail, postage prepaid, to the following:

ANTONE RODNEY THOMPSON
350 S 500 W
CEDAR CITY UT 84720



Kim Lesh
Administrative Secretary

ADDENDUM “D”

Antone Rodney Thompson
350 S. 500 W.
Cedar City, Utah 84720
Telephone (435)586-1345 FAX

RECEIVED

MAR 15 2005

Russell C. Skousen, Exec. Dir. Dept. Of Commerce
Heber Wells Building, 2nd Floor
160 East 300 South-P.O. Box 146741
Salt Lake City Ut. 84114-6701
Ph.(801)530-6702/6446 FAX

UTAH DEPT. OF
COMMERCE

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSE OF)	MOTION FOR A STAY OF Jan.12,'05	STIPULATION,
ANTONE R. THOMPSON)	PENDING JUDICIAL/AGENCY REVIEW	
TO PRACTICE AS A PROFESSIONAL)	Case #:DOPL-2002-123	
ENGINEER IN THE STATE OF UTAH)	Judge: Masuda Medcalf	

I, Antone Rodney Thompson, come before the court to request a stay of stipulation between the Division of Occupational & Professional Licensing and Antone Rodney Thompson dated Jan. 12, '05(Stipulation) pursuant to Ut. Admin. Code §§ R151-46b-12(4)(a) & (b) and as noted in the attached Affidavit in support of Judicial/Agency Review.

I am stating here that my license to practice engineering in the State of Utah is the sole livelihood in support of my wife & four children.

That my family and I will suffer irreparable injury without me being able to practice as an engineering in the State of Utah.

That I have never had any engineering failures, lawsuit and that I have had no unhappy clients to my knowledge.

That the Department of Professional Engineers & Land Surveyors have never shown any complaint verifying that my engineering services would place anyone at risk, even though they are reported to have told individuals that I'm a bad engineer. If they are saying this to other people I would certainly like to see the basis for their complaints. If there is any validity to any claim against me I would certainly implement any corrective measures necessary.

Inasmuch as the DOPL has made statements regarding me as a bad engineer I feel that it is my right to stand up for myself and state some highlights of my engineering, which are:

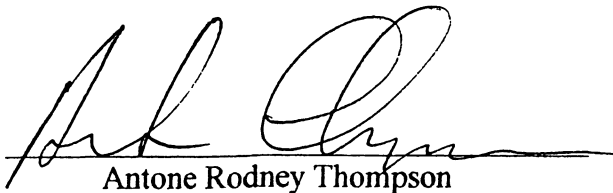
1. When the prison in Cedar City, Ut. was in construction; I located a beam that was improperly designed. The engineering company acknowledged their error and redesigned the beam. This saved the State of Utah money & possibly lawsuits.
2. When the Escalante High School was in construction and the engineering company designed a beam that was unavailable, I submitted a composite steel concrete design that saved the State of Utah money and was accepted by the engineering company.
3. When the Brianhead power generator building was being designed I corrected some engineering that saved the town of Brianhead money so that they didn't have to buy a new generator like the Quitchapaw power generator, that failed and had to be replaced because

(Motion for a Stay of Jan.12,'05 Stipulation, Pending Judicial/Agency Review)

of improper engineering. The engineering company that designed the Quitchapa power generator building accepted my design of the Brianhead power generator over their own design which saved the town of Brianhead a new generator.

4. I saved people time and money by implementing innovative designs in post-tensioned masonry beams & columns, composite steel & concrete beam designs, pressure grouting foundations over conventional pier foundations. One example is a building in Cedar City designed by another engineering company, that failed due to soil problems. This buildings foundation had large caissons. The building that I designed next to it, used steel columns & pressure grouting, which was light and gave good load distribution and has never failed.
5. There are many other engineering designs that have the interest of the public safety and money at heart, if anyone is interested in my success examples I would be happy to share them.

This Motion for a Stay of Jan.12,'05 Stipulation, pending judicial/agency review, dated Mar.18,'05 is made timely and in good faith by:



Antone Rodney Thompson

MAILING CERTIFICATE

I hereby certify that on the 18th day of March, 2005, a true and correct copy of the foregoing Motion for a Stay of Jan. 12, '05 Stipulation, Pending Judicial/Agency Review was sent via FAX or hand delivered to the following:

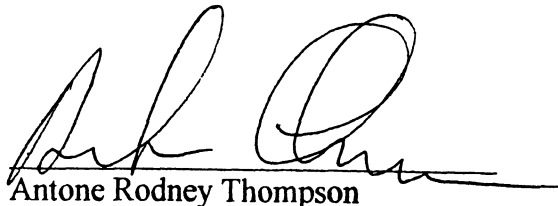
Lenore Epstein (USB 6723)
ASSISTANT ATTORNEY GENERAL
Council for the Division of Occupational & Professional Licensing
Heber M. Wells Building, 5th Floor
160 E 300 S - Box 140872
Salt Lake City, Ut. 84114-0872
Telephone: (801)366-0310/530-6001 FAX 366-0315
530 4849/8775263994

Steve Eklund, Administration Law Judge
Heber M. Wells Building, 5th Floor
160 E 300 S - Box 146741
Salt Lake City, Ut. 84114-0872
Telephone: (801)366-0310/530-6001

Masuda Medcalf, Administrative Law Judge
Heber M. Wells Building, 2nd Floor
160 E 300 S
Salt Lake City, Ut. 84114
Telephone: (801)530-7663/530-6001

Governor Huntsman
Greg Hartley, Assistant
Telephone: (801)538-1000/1528 FAX

Russell C. Skousen, Exec. Dir. Dept. Of Commerce
Heber M. Wells Building, 2th Floor
160 E 300 S - Box 146741
Salt Lake City, Ut. 84114-6701
Telephone: (801)530-6702/6446 FAX



Antone Rodney Thompson

ADDENDUM “E”

70 Craig Jack
David Star



BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REQUEST	:	
FOR AGENCY REVIEW OF	:	
	:	ORDER REGARDING
Antone R. Thompson,	:	STAY REQUEST
	:	
PETITIONER	:	DOPL-2002-123

PROCEDURAL BACKGROUND

Petitioner Antone R. Thompson is a professional engineer licensed by the Division of Occupational and Professional Licensing ("Division"). On October 29, 1999, the Division issued an Order suspending Petitioner's license, but staying the suspension in favor of a three-year period of probation and compliance with various conditions. On June 3, 2002, the Division filed a Petition and Order to Show Cause alleging that Petitioner failed to comply with the 1999 Order. After protracted proceedings, a hearing was scheduled for January 12, 2005. On the day of the hearing, however, the parties arrived at a Stipulation in lieu of the hearing, and an Order was issued that same day adopting the Stipulation (jointly referred to at times as "the Stipulation and Order").

As part of the Stipulation and Order, Petitioner agreed that effective February 11, 2005 (30 days from the date of issuance), his license would be suspended for a minimum of four months, the suspension would be lifted only upon satisfactory completion of various conditions and a determination by the licensing Board that his work demonstrates an ability to safely practice as an engineer, and a three-year period of probation would

follow upon certain terms and conditions. Six days later, Petitioner attempted to rescind or set aside the Stipulation and Order, alleging that the Division had breached the agreement by prematurely posting the suspension of his license on the Division website. After a hearing on Petitioner's motion, the Division issued an order on February 16, 2005, ruling that Petitioner had not established a sufficient basis to set aside the Stipulation and Order (hereafter referred to as the "February Ruling").

On March 18, 2005, Petitioner filed a timely request for agency review challenging the Division's denial of his motion. Petitioner also requests that the effective date of the suspension be stayed and asks for an interim order of stay pending the Division's response to the stay request.

REASONING AND ORDER

A party seeking agency review "may request that the effective date of the order subject to review be stayed pending completion of review." Utah Admin. Code, R151-46b-12(4)(a). The Division may oppose the request within ten days from the date the stay is requested. Utah Admin. Code, R151-46b-12(4)(b). The Department may enter an interim order granting a stay pending a decision on the motion for a stay. *Id.* "In determining whether to grant or deny a request for stay, the department shall review the division's or committee's findings of fact, conclusions of law and order to determine whether granting a stay would, or might reasonably be expected to, pose a significant threat to the public health, safety and welfare." Utah Admin. Code, R151-46b-12(4)(c). The Department may also issue a conditional stay, imposing conditions or restrictions. *Id.*

Petitioner argues that the Division's February Ruling is the subject of this agency review and that document contains no findings of fact or conclusions of law that indicate any threat to the public health, safety and welfare of the public if a stay were granted.¹ However, it is not reasonable to limit the Executive Director's review to the February Ruling, which simply addressed a post-judgment motion relating to the Stipulation and Order. Moreover, the language in Utah Admin. Code R151-46b-12(4)(c) that the "department shall review the division's or committee's findings of fact, conclusions of law and order to determine whether granting a stay would, or might reasonably be expected to, pose a significant threat to the public health, safety and welfare" requires that at a minimum, the Executive Director shall consider the findings of fact, conclusions of law and order of the Division. It does not contain any limiting language such as "the department shall consider only the Division's findings of fact, conclusions of law..." Therefore, for the purposes of determining whether a stay presents any threat to the public health, safety and welfare, the rule must be interpreted to allow the review of other relevant documents in this matter.

The Division's record indicates that the 1999 Order was based upon Petitioner's engineering services with respect to certain plans for a warehouse and showroom. In 1998, Petitioner reviewed a construction contractor's plans for the structure, added some generic structural specifications and affixed his seal to a letter indicating that he reviewed the plans and approved the structure. However, a permit was not issued, because the Cedar City officials determined that the plans were inaccurate and incomplete.

Subsequent to the disciplinary action, the licensing Board and the Division found that the

¹ Ironically, Petitioner attempts to limit the Executive Director's review to the provisions of the February Ruling but attaches his Affidavit to the memorandum in support of a stay and relies upon the Affidavit and the many exhibits to the Affidavit in arguing that he poses no threat.

specifications failed to meet the applicable building code requirements and that Petitioner wrongfully affixed his seal to plans prepared by someone he did not supervise. It was thus concluded that Petitioner's conduct was grossly negligent and an extreme departure from the standards of practice for professional engineers. Based upon the Division's concerns about public safety, the 1999 Order required Petitioner to comply with various measures to ensure that he was following appropriate engineering practices.

The above-noted findings and conclusions of the Division lead to the conclusion that a complete stay would not be in the best interests of the public. However, because Petitioner's livelihood is at stake, the Executive Director finds that the public could be adequately protected with a conditional stay of the Division's Order with appropriate measures to monitor his practice. The Executive Director is therefore prepared to issue an order conditionally staying the suspension of Petitioner's license upon Petitioner's compliance with the following requirements:

1. Petitioner shall submit in writing to the Executive Director the name of an engineer in good standing with the Division who is available and willing to act as a peer reviewer to review Petitioner's engineering work, who has no conflict of interest with this matter, and who is qualified in the type of engineering work performed by Petitioner.²
2. As to the peer reviewer identified in paragraph 1, Petitioner shall submit to the Executive Director the following:
 - a. The peer reviewer's resume; and
 - b. A letter from the peer reviewer stating that he/she has no conflict with this matter, that he/she is interested and available to conduct reviews of Petitioner's work, and that

² Petitioner alleges in his Affidavit that he has previously submitted to the Division the name of the Kerry Carpenter. So that there is no misunderstanding, in order to comply with this Order, Petitioner must submit anew the name of an appropriate peer reviewer. All submissions shall be made to the Executive Director with service to the Division's counsel as provided in Utah Admin. Code R151-46b-8 and R151-46b-12(3)(e).


he/she is qualified in the area of engineering work performed by Petitioner;

3. Petitioner shall submit to the Executive Director a project list identifying all engineering projects he has performed within the past two years. This list shall include the project name, type of work, the client or owner, the start and estimated completion dates, the names and contact information of the building officials, and the fee earned.
4. Petitioner shall submit to the peer reviewer a copy of the project list identified in paragraph 3 and shall make a written request of the peer reviewer to review 20 percent of the engineering work performed by Petitioner in the past two years. Petitioner shall pay the peer reviewer for any costs associated with such a review. The peer reviews shall comply with the requirements and deadline to be established by the Division.
5. Petitioner shall submit to the Executive Director a copy of the written request to the peer reviewer identified in paragraph 4.

Upon receipt of this Order Regarding Stay Request, the Division shall submit a document indicating the requirements and deadline it has established for the peer reviews. Thereafter, upon Petitioner's successful compliance with the requirements in paragraphs 1 through 5 above, the Executive Director will issue an order conditionally staying the suspension of Petitioner's license. Such order will include further requirements as follows:

6. Petitioner shall submit to the Executive Director a copy of the peer reviews conducted by the peer reviewer as established in paragraph 4.
7. Petitioner shall submit an updated project list on a monthly basis, on the first Monday which is not a holiday, until the completion of this agency review proceeding.

DATED this 6th day of April, 2005.



Russell C. Skousen, Executive Director
Department of Commerce

CERTIFICATE OF MAILING


I certify that on the 6 day of April, 2005, the undersigned mailed a true and correct copy of the foregoing Order Regarding Stay Request by first class mail and facsimile to:

Kevin M. Sheff, Esq.
Robert B. Sykes & Associates, P.C.
311 South State Street, Suite 240
Salt Lake City, UT 84111-2320
Fax: (801) 533-8081

and caused a copy to be hand-delivered to:

Craig Jackson, Director
David Stanley, Associate Director
Division of Occupational and Professional Licensing
160 East 300 South
Salt Lake City, UT 84111

Lenore Epstein, Assistant Attorney General
Office of the Attorney General
160 East 300 South
Salt Lake City, UT 84111


Rebekah Brown
Administrative Assistant

ADDENDUM “F”

Antone R. Thompson
San Diego



**BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF THE REQUEST
FOR AGENCY REVIEW OF

Antone R. Thompson,

PETITIONER

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ORDER GRANTING
MOTION TO STRIKE, and
ORDER ON REVIEW**

DOPL 2002-123

INTRODUCTION

Antone R. Thompson ("Petitioner") brings this request for agency review before the Department of Commerce ("Department") seeking review of a decision by the Division of Occupational and Professional Licensing ("Division"), which denied his request to rescind a stipulation he executed with Division representatives and the Order based upon that Stipulation.

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to Utah Code Annotated, Section 63-46b-12, and Utah Administrative Code, R151-46b-12.

ISSUES REVIEWED

Whether the Division's denial of Petitioner's request to rescind the Stipulation was reasonable, and whether information provided by Petitioner through his affidavits should be stricken as not part of the Division record.

FINDINGS OF FACT

1. Petitioner became licensed as a professional engineer in this state on February 21, 1989.

2. On October 29, 1999, Petitioner's license was suspended, but the suspension was stayed in favor of probation for three years provided he complied with certain terms and conditions. Such discipline was based upon the Division's conclusions that Petitioner engaged in grossly negligent conduct, by affixing his seal to critically deficient specifications, which were not prepared by him or under his supervision. According to the Division, Petitioner's conduct constituted "an extreme departure from the standards of practice governing all professional engineers."

3. As one condition of probation, Petitioner was required to identify a peer reviewer who would randomly audit 20% of his work every six months. Petitioner was also required to meet with the Professional Engineers and Professional Land Surveyors Licensing Board ("Board") every six months and to complete the Utah Law and Rules Examination for professional engineers within three months of the 1999 Order.

4. On June 3, 2002, an Order to Show Cause ("OSC") was issued by the Division, based on allegations that Petitioner had failed to comply with the 1999 Order. After lengthy pre-hearing negotiations and discovery, a hearing before the Board was set for January 12, 2005. Two days prior to the OSC hearing, on January 10, 2005, Petitioner's then attorney submitted a motion to withdraw as counsel and the motion was granted.

5. On the day of the OSC hearing, Petitioner appeared *pro se*. He engaged in discussions with the Division's counsel about the terms of the Stipulation which was to

resolve all disciplinary actions against him. He and counsel for the Division initialed a change to Paragraph 4 of the Stipulation, which deleted the language that Petitioner was represented by counsel. The discussions lasted approximately 40 minutes, after which the Petitioner and the Division's counsel signed the Stipulation.

6. The Stipulation provided that Petitioner's license would be suspended for a minimum of four months, to become effective 30 days from the date the Division entered an order based upon the Stipulation. The Stipulation further provided that Petitioner bore the burden of demonstrating to the Division and the Board that he was competent to practice in order to have the suspension lifted. Additional relevant excerpts from the Stipulation are as follows:

Paragraph 3. [Petitioner] acknowledges that he enters into this Stipulation knowingly and voluntarily, and that other than what is contained in this agreement, no promise or threat has been made by the Attorney General, the Division, or any member, officer, agent or representative of the Division or the Attorney General to induce him to enter into this agreement.

Paragraph 5. [Petitioner] understands he is entitled to [a] hearing before the Professional Engineers and Professional Land Surveyors Licensing Board ("the Board"), at which time he may present evidence on his own behalf, call witnesses, and confront adverse witnesses. Respondent acknowledges that by executing this document he waives the right to a hearing and any other rights to which he may be entitled in connection with said hearing.

Paragraph 6. A Notice of Agency Action and Order to Show Cause have been issued in this matter, and the Division and the Respondent agree that this Stipulation and Order shall be the full and final resolution of all allegations and claims raised in the Order to Show Cause. If the Stipulation is adopted by the Director of the Division, no further action shall be taken by the Division based upon the allegations and claims raised in the Order to Show Cause.

7. The Administrative Law Judge (“ALJ”) briefly discussed the Stipulation with the parties prior to adjourning the hearing. A transcript of that discussion provides in pertinent part:

The Court: ...The Division is represented by Lenore Epstein, Assistant Attorney General, State of Utah. The Respondent, Antone R. Thompson is present. And Mr. Thompson, I believe you are representing yourself; is that correct?

Mr. Thompson: Correct.

The Court: The hearing in this case was scheduled to commence on January 12, 2005 at 10:00 a.m. before the Professional Engineers and Professional Land Surveyors Board. It is approximately 10:23, and over the last 30 to 40 minutes, Ms. Epstein and Mr. Thompson have been reviewing the terms of a proposed stipulation as to resolve this case by agreement between the parties and eliminate the need for a hearing before the Board on today’s date...

Mr. Thompson, I just wanted to confirm one procedural matter with relation to all this. It’s something you and I discussed briefly when I first saw you this morning. Mr. Harold Reiser was representing you in this proceeding, and he filed a motion to withdraw as counsel. And I believe you were aware of that motion; were you not?

Mr. Thompson: Correct.

The Court: ...Mr. Reiser mentioned yesterday during our discussion that there was still the possibility this case could be resolved by agreement between yourself and the Division. And as I’ve just indicated, that’s exactly what has occurred here in this case. And I believe you have been provided a copy of that written stipulation; have you not?

Mr. Thompson: Yes.

The Court: Mr. Thompson, anything else at this point on your behalf?

Mr. Thompson: No.

(January 12, 2005, Hearing Transcript, pp. 3-6).

8. By order dated January 16, 2005, the Stipulation was adopted by the Division Director.

9. On January 18, 2005, Petitioner filed a document entitled “Rescission of Stipulation.” The Division filed a motion to strike Petitioner’s Rescission of Stipulation

and the two motions came for an evidentiary hearing before the Division on February 11, 2005. That hearing is hereafter referred to as the “rescission hearing.”

10. On February 18, 2005, the Division issued its Order denying Petitioner’s request to rescind the Stipulation. That Order included various findings of fact, which are hereby adopted as follows:

Finding No. 4. [Petitioner] appeared for the January 12, 2005 hearing without legal counsel. Prior to the scheduled commencement of that hearing, Ms. Epstein and [Petitioner] informed the Court that the parties desired to pursue final settlement negotiations. The Court granted that request and the parties’ review of a possible stipulation proceeded for approximately forty (40) minutes.

Finding No. 5. [Petitioner] ultimately elected to resolve this proceeding by agreement and he thus signed the January 12, 2005 Stipulation...

Finding No. 6. Paragraph 10(a) of the January 12, 2005 Stipulation recites that [Petitioner’s] license “shall be suspended for a minimum of four months from the effective date of this Order.” Paragraph 7 of the January 12, 2005 Stipulation provides that the January 12, 2005 Stipulation and Order will be “classified as a public document” and that the “terms and conditions of the Stipulation and Order will be effective thirty (30) days after the date it is signed by the Director.”

Finding No. 8. ...Ms. Inglesby [the Division’s Administrative Assistant] reviewed the Stipulation and Order to enter the change in [Petitioner’s] license status.

Finding No. 9. Ms. Inglesby noted that [Petitioner’s] license was to be suspended for a minimum of four (4) months. However, she did not locate the provision in Paragraph 7 of the January 12, 2005 Stipulation that the suspension would not become effective until thirty days after the date of the order. There are numerous and lengthy recitals in the January 12, 2005 Stipulation and the provision suspending [Petitioner’s] license is not located in the same paragraph as the one which identified when that suspension would become effective. Given those circumstances, Ms. Inglesby mistakenly entered [on the Division’s website] the present status of [Petitioner’s] license as being suspended.

Finding No. 10. Ms. Inglesby made the entry for the Division’s website on January 13, 2005. The screen with that entry was accessible to the public on January 14, 2005. [Petitioner] subsequently became aware of that entry when a contractor or other working associate informed [Petitioner] of their belief that his license was suspended as reflected on the Division’s website.

Finding No. 11. [Petitioner] then filed the “Rescission of Stipulation”, which included the claim that the Division breached the January 12, 2005 Stipulation when the suspension of [Petitioner’s] license was prematurely posted on the Division’s website. Ms. Inglesby corrected the erroneous entry on the website on January 18, 2005. Accordingly, the screen accessible by the general public on January 19, 2005 reflected that [Petitioner’s] license was on probationary status.

11. On March 18, 2005, Petitioner filed a request for agency review. He also requested a stay of the Stipulation and Order and submitted his “Affidavit in Support of Judicial/Agency Review.” This first affidavit raises new factual matters including a 1996 incident involving Petitioner’s daughter, Petitioner’s speeding ticket of September 1997, and Petitioner’s discussions with the prosecutor over both incidents. Petitioner subsequently submitted two additional affidavits on April 4, 2005, and April 20, 2005. These additional affidavits and Petitioner’s memorandum in support of his request for agency review express Petitioner’s concerns about the terms of the 1999 Order and his attempts to comply with that Order; they state concerns about lack of due process in the proceedings that led to the 1999 Order; and state new reasons why the Stipulation should be set aside. Petitioner has requested oral argument.

12. On April 6, 2005, an Order was issued on Petitioner’s request for a stay, indicating that a conditional stay order would be entered provided Petitioner first met certain requirements designed to monitor his practice. To date, Petitioner has not met those stated requirements.

13. On April 22, 2005, the Division filed a Motion to Strike Petitioner’s affidavits on the grounds that the affidavits introduce new matters and evidence not made part of the record below.

14. Petitioner filed a reply memorandum in which he also responded to the Division’s Motion to Strike.

CONCLUSIONS OF LAW

1. The standards for agency review correspond to those established by the Utah Administrative Procedures Act (“UAPA”), Utah Code Annotated Section 63-46b-16(4). Utah Admin. Code R151-46b-12(7).

2. This agency review is from a Division decision denying the Petitioner’s request to set aside a Stipulation that he executed with the Division and now wishes to rescind. The standard of review from such denial is “abuse of discretion.” *Martinez v. Progressive Northwestern Insurance Co.*, 2005 UT App 297; *Richins v. Delbert Chipman & Sons*, 817 P.2d 382, 387 (Utah Ct. App. 1991). However, before such analysis, it is appropriate to address those matters not properly before the Acting Executive Director. Hence, the extensive Findings of Fact above and the detailed Section A of these Conclusions of Law set forth the long historical background of this matter for the purpose of identifying those issues that are not properly raised by Petitioner.

A. Petitioner’s Arguments

3. In filing his Rescission of Stipulation, Petitioner included seven counts of arguments. The first six relate to allegations of misconduct by the Division prior to and during the hearing that resulted in the 1999 Order and a claim that the 1999 Order contained vague, ambiguous and arbitrary/capricious provisions. The seventh count states that the Division’s premature posting of Petitioner’s license suspension on its web site was a breach of the Stipulation and therefore requires the rescission of the Stipulation.

4. At the rescission hearing, Petitioner explained that he raised the first six counts in order to establish a trend of misconduct by the Division. He also mentioned

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that he did not have sufficient time to review the Stipulation and that he signed the Stipulation because he was told by Division representatives that they would seek the revocation of his license. The Petitioner stated as follows:

Okay. As the Court knows, I didn't have the Stipulation until, like, five, ten minutes before the hearing. Dan Jones had informed me in the presence of Lenore [Epstein] that he was going to move for a revocation of my license, even prior to, you know, to the hearing; that really there was no evidence I could provide that would take outside the scope of revocation. And I signed that stipulation on the word of Lenore, that the Division is solely interested in moving this on and has no intent of injury to me. And that is my grounds.

I rescinded it within three business days, and is based, even though I didn't say that in the rescission, was based on Dan Jones's words to me that, you know, "Mr. Thompson, you're way beyond. It's revocation." I felt that I – you know, he just doesn't like me. There is no chance here. And upon Lenore's promise to me that even though the stipulation was still vague, ambiguous to me, and apparently to some other people here at the DOPL, that I would go ahead and sign it on Lenore's promise to me. And I didn't have a whole lot of time to review.

(February 11, 2005, Hearing Transcript, p. 14). Finally, Petitioner claimed that the Division breached the Stipulation by prematurely posting his suspended status.

5. Upon agency review, Petitioner's initial memorandum and his affidavits raise several additional arguments for a rescission of the Stipulation, including the following:

- (a) the Division failed to comply with its own hearing procedures by not entering into the agreement two days prior to the hearing¹;
- (b) that Petitioner was not represented by legal counsel;
- (c) that he was under the influence of pain medication when he signed the Stipulation and was not competent to enter into the Stipulation; and
- (d) that Petitioner signed the Stipulation under threat, duress, and coercion from a Division staff member and the Division's counsel.

¹ Petitioner refers to the Notice of Notice of Agency Action and Order To Show Cause Hearing, issued by the Division on June 30, 2002, which specifically states that "any agreement to resolve this proceeding in lieu of a hearing shall be in writing and executed by the parties no later than two (2) days prior to the scheduled hearing." This argument by Petitioner is hereafter referred to as the "two-day rule."

Additional factual matters raised in the affidavits include an incident with Petitioner's daughter, his speeding ticket, and his discussions with a prosecutor. They also contain arguments that 1999 Order was vague and arbitrary, that he has in fact complied, and that he was not given due process in the disciplinary proceedings that led to the 1999 Order. Finally, Petitioner cites for the first time on agency review the cases of *Bergstrom v. Moore*, 677 P.2d 1123, 1125 (Utah 1984) and *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 725 Utah App. 1990), for the proposition that the Division's premature posting of his suspended status requires the rescission of the Stipulation and Order.

6. In his reply memorandum, Petitioner raises yet again new arguments that the Division has misinterpreted or misapplied the law, the Division has abused its discretion, and the Division has acted contrary to its own practices.

B. New Information and Arguments – Motion to Strike Granted

7. The Acting Executive Director's review is limited to a review of the Division record. Utah Code Ann. Section 63-46b-16(4). *See also* Utah Admin. Code R151-46b-12(7). Thus, all new factual information that Petitioner provides in his many affidavits and his memoranda on agency review, which was not initially raised before the Division, is an improper attempt to supplement the Division's record. Accordingly, the Division's Motion to Strike Petitioner's three affidavits is hereby granted.

8. In addition, legal issues must be raised at the Division level in order to be properly preserved for agency review. *See Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998) ("level of consciousness" test applied to administrative agency case, requiring a party to raise any issues and allow the hearing officer an opportunity to correct any deficiencies); *Brinkerhoff v. Schwendiman*, 790 P.2d 587, 589 (Utah Ct. App.

1990) (holding that a party must raise an objection in an earlier proceeding or waive its right to litigate the issue in subsequent proceedings, a principle not limited to the trial court setting but equally to administrative hearings).

9. Petitioner did not properly preserve for agency review the new arguments he now raises regarding the two-day rule, not being represented by counsel, being under the influence of medications, that the Division coerced him into signing the Stipulation, etc. Petitioner stated at the rescission hearing that he signed the Stipulation after Division representatives told him that they would seek the revocation of his license, and that he believed at that point that “[t]here is no chance here.” The above statements do not substantiate a claim of coercion; they allege nothing more than the Division’s intent to seek the revocation of Petitioner’s license, and Petitioner’s belief that he would not be successful at the hearing. Moreover, there was no evidence presented by Petitioner that he was in fact coerced by Division representatives.² Because Petitioner failed to bring these issues to the Division at the time of the rescission hearing, the Division had no opportunity to examine whether these arguments supported a rescission or setting aside of the Stipulation. *Badger*, at 847. By his own failure to raise these arguments, Petitioner waived them. As a result, such arguments cannot now be considered on agency review. *Id.* See also *Richins*, 817 P.2d at 387 (Court affirming trial court’s dismissal of motion to set aside stipulation and declining to consider movant’s arguments raised for the first time on appeal).

² The Stipulation even states that Petitioner enters into the Stipulation knowingly and voluntarily and that no threats or promises were made to induce him to sign the Stipulation. Stipulation, ¶ 3.

C. Denial of Request to Rescind Was Not Abuse of Discretion

10. What is left then is the Division's consideration of Petitioner's arguments stated in his "Rescission of Stipulation" and those he raised at the OSC hearing. A request for relief from the Division's Order based upon the Stipulation is properly treated as a motion for relief from judgment under Rule 60(b) of the Utah Rules of Civil Procedure.³ *Richins*, 817 P.2d at 387. The *Richins* Court stated:

A trial court has discretion in determining whether a movant has shown [Rule 60(b) grounds], and this Court will reverse the trial court's ruling only when there has been an abuse of discretion.

Id. Thus, as was previously stated, in determining whether the Division properly denied Petitioner's motion to set aside the Stipulation and Order, the applicable standard is "abuse of discretion." *Id.* A challenge based upon the grounds of abuse of discretion is reviewed for "reasonableness." *Morton Int'l, Inc. v. Utah State Tax Commission*, 814 P.2d 581, 587 (Utah 1991). "Furthermore, the scope of review of trial court orders denying rule 60(b) relief is limited...the reviewing court will not reach the merits of the underlying judgment." *Martinez*, 2005 UT App 297. Therefore, the Acting Executive Director must determine whether the Division acted reasonably in denying Petitioner's motion to set aside the Stipulation.

11. In denying the Petitioner's request to rescind the Stipulation and Order, the Division adopted the ALJ's findings and conclusions. The ALJ had concluded that

³ That Rule provides that a court may, in the furtherance of justice, relieve a party from a final judgment or order for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence...;
- (3) fraud..., misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged...; or
- (6) any other reason justifying relief from the operation of the judgment.

Utah R. Civ. P., Rule 60(b).

Petitioner's attempts to establish a pattern of misconduct leading to the 1999 Order were removed in time, and had no rational connection to the validity of the Stipulation; that Petitioner's concerns regarding the terms of the 1999 Order were resolved by the parties by the Stipulation; and that Petitioner entered into the Stipulation knowingly and voluntarily, after ample opportunity to review the proposed terms. He then heard evidence on Petitioner's allegations that the Division breached the Stipulation to determine if there was any fraud, misrepresentation or any other misconduct by the Division so as to warrant a rescission or setting aside of the Stipulation under Rule 60(b)(3). The ALJ concluded that the Division's conduct did not constitute such fraud, misrepresentation or misconduct, because the website entry was a clerical error and an honest mistake that was immediately corrected by the Division upon its discovery.

12. The Division's and ALJ's conclusions were reasonable in this case. Petitioner's attempts to challenge the 1999 Order were properly rejected. Petitioner did not file a petition for judicial review of the 1999 Order, and thus gave up his opportunity to challenge the findings and conclusions that led to that Order. Petitioner's arguments that the terms of the 1999 Order were vague and arbitrary and his claims that he did in fact comply with the Order were also properly rejected. Such arguments would have been appropriate at the OSC hearing. However, Petitioner chose to avoid the OSC hearing and entered into the Stipulation in lieu of that hearing. The only arguments that were appropriate at the rescission hearing, therefore, were those provided by Rule 60(b).

13. Finally, the ALJ considered Petitioner's arguments regarding the Division's conduct as to the web site posting under Rule 60(b)(3), "fraud, ... misrepresentation, or other misconduct." The Petitioner has not challenged such Rule

60(b)(3) classification, and such classification was proper under the *Richins* decision. *Richins*, at p. 387. Based upon the testimony presented at the OSC hearing by Division personnel, it was not unreasonable to conclude that the Division employee made a clerical error or mistake (failing to notice the 30-day provision within the body of the Stipulation and Order), rather than engaging in misrepresentation, fraud or misconduct.

14. On agency review, Petitioner cites to certain Utah cases that rescinded real estate purchase contracts based upon a statutory covenant against encumbrances. *Bergstrom v. Moore*, 677 P.2d 1123, 1125 (Utah 1984) and *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 725 Utah App. 1990). The Division had no opportunity to rule on the applicability of Petitioner's legal authority, because Petitioner failed to notify the ALJ at the rescission hearing of his reliance on these cases. Even if he had, however, it is unlikely that the ALJ would have found the cases helpful to Petitioner's position. The courts in *Bergstrom* and *Breuer-Harrison* concluded that the seller's failure to disclose certain easements breached the statutory covenant and thereby the sales contract, thus requiring rescission of the contracts. In contrast, there is no statute in this case that prevents the parties to a professional license disciplinary proceeding from stipulating in lieu of a hearing. The case law more applicable to this matter appears to be that settlement agreements are generally upheld by the courts. *See Ostler v. Buhler*, 957 P.2d 205, 206 (Utah 1998) (holding that "settlements are favored in the law, and should be encouraged, because of the obvious benefits accruing not only to the parties, but also to the judicial system.")

15. Similarly, it was not unreasonable to deny Petitioner's request to rescind upon the ALJ's findings that Petitioner had sufficient time to review the Stipulation.

Petitioner had approximately 40 minutes on the day of the OSC hearing to review the Stipulation and discuss its terms with the Division's representatives. At the beginning of the OSC hearing, the ALJ acknowledged on the record that the parties had reached a stipulation after 30 to 40 minutes of discussions; that they had signed the stipulation; that Petitioner's counsel had withdrawn; and that prior to his withdrawal, the attorney, had informed the ALJ that a stipulation could still be reached in lieu of a hearing. Petitioner confirmed that he was aware of his attorney's withdrawal, that he'd received a copy of the Stipulation and that he had nothing more to address at that time. Petitioner failed to inform the ALJ that he was concerned about any of the provisions in the Stipulation, that he did not have sufficient time to review the Stipulation, or that he disagreed with the ALJ's representations that they had been engaged in discussions for 30 to 40 minutes.

16. Moreover, given the history of this matter, it is unlikely that the terms of the Stipulation came as a surprise to Petitioner on the day of the OSC hearing. The record indicates that from June 24, 2002, until the OSC hearing scheduled for January 12, 2005, Petitioner had two attorneys. Each of these attorneys had engaged in settlement negotiations with the Division. As late as January 10, 2005, upon withdrawing as Petitioner's counsel, attorney Harold Reiser informed the ALJ that the matter could still be settled.

17. It is important to note that the same ALJ who received the Stipulation and questioned the parties on the record prior to canceling the OSC hearing was the ALJ who heard Petitioner's arguments at the rescission hearing. The ALJ recalled the circumstances leading up to the Stipulation, the discussions held in court, and the demeanor of the parties:

...[A]nd I recall it well, we came here for the hearing before the Board and the decision was made that morning to resolve the case by agreement. And so there was no evidentiary proceeding conducted before the Board at the time because the parties had resolved it by that stipulation. Under these circumstances, and the fact that you elected, having reviewed the proposed stipulation, to accept it as provided rather than proceed with this evidentiary hearing before the Board, it strikes me as a freely-given, intelligent, knowing election on your part to resolve the case in that manner. And as to that count, I don't see them under those circumstances, that it has any bearing on the validity of the stipulation for the reasons I've just stated.

(Rescission Hearing Transcript, p 7 lines 23-25, p. 8, lines 1-16). *See also Richins*, at pp. 384-385 (noting that the trial court's independent recollection of the original proceedings, combined with the evidence in the record, supported the conclusion that the trial court did not clearly err in finding that the stipulation was valid).

18. In sum, the Acting Executive Director will not consider any new evidence or arguments raised by Petitioner for the first time on agency review, as her review is limited to evaluating the Division's record and Petitioner failed to properly preserve many of his legal arguments for agency review. Petitioner has also failed to prove that the Division's decision to deny his request to rescind the Stipulation was an abuse of discretion or arbitrary and capricious. Although the clerical error made by the Division is regrettable and unfortunate, it was not unreasonable to conclude that this honest mistake was not sufficient grounds to rescind the Stipulation. Additionally, given the history of this matter, the parties' prior settlement negotiations, and the Petitioner's opportunity to review the Stipulation for 40 minutes prior to signing it, it was not unreasonable for the Division to conclude that Petitioner had sufficient time to review the Stipulation. It is clear that Petitioner wishes he had not entered into the Stipulation, but such remorse is not sufficient grounds to set aside an agreement when Petitioner was aware of the

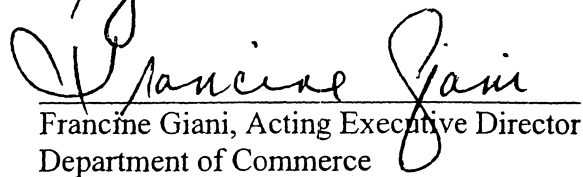
ramifications of signing the settlement agreement, he was not surprised by any new terms, and he did not neglect any point in reaching a settlement. *Ostler*, at pp. 206-207. As the Division points out, parties are generally bound by their stipulations, and it is their duty to exercise due diligence and ordinary care, including reviewing a stipulation prior to signing it. *Yeargin, Inc. v. Utah State Tax Comm'n*, 20, P.3d 287, 292 (Utah 2001).

ORDER ON REVIEW

Because the parties have more than adequately briefed the issues in this case, pursuant to her discretion in Utah Code Ann. §63-46b-12(4) and Utah Admin. Code, R151-46b-12(6), the Acting Executive Director of the Department of Commerce hereby denies Petitioner's request for oral argument.

The Division's decision denying Petitioner's request to rescind the Stipulation and Order entered on January 12, 2005, is hereby affirmed. The parties shall hereafter conduct themselves in accordance with the terms and conditions of the Stipulation and Order.

DATED this 4th day of Aug., 2005.


Francine Giani, Acting Executive Director
Department of Commerce

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the Court of Appeals within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and

63-46b-16, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeois v. Department of Commerce, et al.*, 981 P.2d 414 (Utah App. 1999) within 20 days after the date of this Order on Review pursuant to Section 63-46b-13.

CERTIFICATE OF MAILING

I certify that on the 4th day of August, 2005, the undersigned mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order on Review by first class mail, properly addressed, postage prepaid, to:

Antone Rodney Thompson
350 S 500 W
Cedar City, Utah 84720

and caused a copy to be hand-delivered to:

J. Craig Jackson, Director
David Stanley, Associate Director
Division of Occupational and Professional Licensing
160 East 300 South
Salt Lake City, UT 84111

Lenore Epstein, Assistant Attorney General
Office of the Attorney General
160 East 300 South
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